No.

IN THE

Supreme Court of the United States

October Term, 1991

PHILLIP AMATO, RITA AMATO, and JAMES RAFFA,

Petitioners,

against

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, SECOND DEPARTMENT

RICHARD E. MISCHEL, P.C.
Attorney for Petitioners
225 Broadway, Suite 2199
New York, New York 10007
(212) 227-7040

RICHARD E. MISCHEL
Of Counsel

QUESTIONS PRESENTED

1. Whether Petitioners' federally guaranteed rights to due process, confrontation and cross-examination were violated by the procedures adopted by the trial court in conducting a jury and a non-jury trial as a single trial.

2. Whether Petitioners' federally guaranteed rights to have compulsory process for obtaining witnesses in their favor was violated by the court's refusal to enforce a subpoena requiring the Commander of the 109th Police Precinct to appear and testify.

3. Whether Petitioner Phillip Amato's federally guaranteed right to counsel of choice was violated by the court's order disqualifying his privately retained counsel, and counsel's law firm, from representing him at trial.

LIST OF PARTIES

The parties to the proceeding below were Petitioners Phillip Amato, Rita Amato, and James Raffa and the Respondent, State of New York.

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MISCELLANEOUS

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Petitioners Phillip Amato, Rita Amato, and James Raffa respectfully pray that a Writ of Certiorari be issued to review the Decisions and Orders of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, rendered on May 28, 1991, which unanimously

affirmed the judgment of the Supreme Court of the State of New York, Kings County, convicting the Petitioners of Arson in the Third Degree (N.Y. Penal Law §150.10 [McKinney, 1988]) and imposing sentence. Leave to appeal to the New York Court of Appeals was denied upon reconsideration on August 21, 1991 (9A-11A).

OPINIONS BELOW

The Decisions and Orders of the Appellate Division of the Supreme Court of New York, Second Department, are reported at: ____ A.D.2d ___, 570 N.Y.S.2d 817 (A.D. 2d Dept. 1991) (Petitioner Phillip Amato); ____ A.D.2d ___, 570 N.Y.S.2d 819 (A.D. 2d Dept. 1991) (Petitioner James Raffa); ____ A.D.2d ___, 570 N.Y.S.2d 1017 (A.D. 2d Dept. 1991) (Petitioner Rita Amato). The Decisions and Orders are reprinted in the Appendix, pp. 1a-8a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The Appellate Division's Decisions and Orders sought to be reviewed were filed on May 28, 1991. Leave to appeal to the Court of Appeals was timely sought on behalf of Petitioners Phillip Amato, Rita Amato, and James Raffa. On August 21, 1991, Hon. Vito J. Titone, Associate Judge of the Court of Appeals of New York, denied leave to appeal to the Petitioners. This Petition for a Writ of Certiorari is filed within the time prescribed by U.S. Sup.Ct. Rule 13, 28 U.S.C.A.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ***; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Fourteenth Amendment:

"*** nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATUTE INVOLVED

N.Y. Penal Law §150.10 (McKinney's 1988). Arson In The Third Degree.

"1. A person is guilty of arson in the third degree when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion.

DISCIPLINARY RULES OF N.Y. CODE OF PROFESSIONAL RESPONSIBILITY.

DR 5-101. Refusing Employment When The Interests of the Lawyer May Impair His Independent Professional Judgment.

"(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness ***"

DR 5-102. Withdrawal As Counsel When The Lawyer Becomes A Witness.

(A) If after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(b)(1) through (4).

STATEMENT OF THE CASE

On April 20, 1987, at approximately 11:00 P.M., a fire broke out at 171-27 Gladwin Avenue, Queens, New York. An investigation ensued, after which Petitioners Phillip Amato, Rita Amato, and James Raffa, and co-defendants Ugo Serrone and Michael Scotto, were accused by a Queens County Grand Jury of committing the crimes of Burglary in the First and Third

Degrees, and Arson in the Third Degree. In addition, Petitioner Phillip Amato and co-defendants Serrano and Scotto were charged in the same accusatory instrument of committing the crime of criminal solicitation.

Pretrial, Petitioner Phillip Amato moved to suppress statements on the ground that they were obtained in violation of his State constitutional right to counsel (see People v. Skinner, 52 N.Y.2d 24, 436 N.Y.S.2d 207, 417 N.E.2d 501 [Ct.App. 1981]). A hearing was conducted at which Petitioner Phillip Amato's retained trial counsel testified to establish that the statements sought to be suppressed were obtained by an informant after Petitioner's right to counsel under the New York State Constitution had indelibly attached, viz: the date and time when he informed law enforcement officials that he represented Petitioner such that no

statements could be elicited from Petitioner without counsel's presence. The court, finding that Petitioner's right to counsel was violated, ordered suppression. The court also ordered that retained counsel, and his law firm, were disqualified from further representing Petitioner Phillip Amato, thereby requiring Petitioner to retain new counsel shortly before trial.

After pretrial motions were decided, Petitioners proceeded to trial before Hon. William D. Friedmann, and a jury. However, co-defendants Serrone and Scotto waived their rights to a jury trial. Petitioners moved to sever their joint trial from the non-jury joint trial of co-defendant Serrone and Scotto. The motion to sever was denied and the court conducted a single jury/non-jury trial.

The State's case against Petitioners and co-defendants Serrone and Scotto wa

entirely circumstantial, the most damning of which came from Joseph Minchella (a resident of the community and friend of Petitioners and the co-defendants), whose role in this case was sufficiently ambiguous that his status as an accomplice was submitted to the jury as a question of fact.[1]

Also relied on by the State was testimony from the owner of the fired premises (Mrs. Surinder Arora) concerning, inter alia, the community's widespread opposition to the sale or renting of her

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[1] In New York, a conviction may not rest on the uncorroborated testimony of an accomplice (N.Y. Crim. Pro. L. §60.22 [McKinneys 1981]). Subdivision 2 of section 60.22 defines an accomplice as:

> "a witness in a criminal action who, according to the evidence adduced in such action, may reasonably be considered to have participated in:
>
> (a) The offense charged; or
>
> (b) An offense based upon the same or some of the same facts or conduct which constitute the offense charged."

house to New York City for use as a residential foster care facility for infants ranging in age from birth to two years, and several alleged incidents between her and members of the community, including Petitioners Phillip Amato, Rita Amato, and James Raffa, and co-defendant Michael Scotto, some of which she reported to the police. To rebut Mrs. Arora's testimony, the defense subpoenaed the commander of the police precinct embracing the neighborhood in which these incidents allegedly occurred, as well as the police reports reflecting the reported incidents and the precinct's books and records for the period covering these incidents.

Though police documents were provided to the defense, the court declined to enforce the subpoena requiring the attendance and testimony of the Precinct Commander, which the defense expected would be that, after a diligent search of the

records was conducted, no reports reflecting the incidents Mrs. Arora allegedly complained about were found. Rather, the court would only permit the defense to cross-examine Mrs. Arora concerning the absence of the reports.

After hearing evidence from both the State and the defense, including testimony from Petitioner Raffa, the jury deliberated for two days ultimately finding Petitioners guilty of burglary in the first degree and arson in the third degree, but not guilty of burglary in the third degree. However, prior to the commencement of jury deliberations, Justice Friedmann dictated into the record his decision dismissing the counts of the indictment charging Petitioners and co-defendants Serrone and

Scotto with burglary in the first and third degrees.[2]

REASONS FOR GRANTING THE WRIT

SUBSTANTIAL ISSUES AFFECTING THE FAIR ADMINISTRATION OF CRIMINAL JUSTICE ARE PRESENTED CONCERNING THE CONDUCT OF JURY/NON-JURY TRIALS IN THE CONTEXT OF A SINGLE CRIMINAL TRIAL, THE RIGHT OF AN ACCUSED TO BE REPRESENTED BY COUNSEL OF CHOICE, AND THE RIGHT TO PRESENT A DEFENSE.

This Petition presents substantial issues affecting the fair administration of criminal justice concerning the conduct of jury/non-jury trials, the right to counsel of choice, and the right to present a defense (see, Rakas v. Illinois, 439 U.S. 128, 130 [1978], reh. denied, 439 U.S. 1122 [1979]). The issues presented are "beyond the academic or episodic" (Rice v. Sioux

---

[2] The state's appeal of the order dismissing burglary in the first degree was ultimately dismissed by the Appellate Division, on the State's consent.

City Cemetery, 349 U.S. 70, 74 [1955]), and are important "to the public as distinguished from" being important to the "particular parties" involved (Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 [1923]; Rice v. Sioux City Cemetery, supra, 349 U.S. at p. 79). Accordingly, certiorari to review the Decisions and Orders of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, affirming Petitioners' convictions of arson in the third degree, should in all respects be granted.

A. The Joint Jury/Non-Jury Trial.

At the Appellate Division, as they did during their trial, Petitioners argued, inter alia, that their federally guaranteed rights to a fair trial, confrontation and cross-examination, were violated by the procedure adopted by the court for

conducting the combined jury/non-jury trial in their case. The Appellate Division rejected these claims, finding that "under the circumstances of this case, the trial court exercised its discretion within permissible legal limits when it ordered a joint bench and jury trial, and that the procedure did not prejudice the defense" (3a).

Prior to trial, the court denied Petitioners' application for a severance of the "jury/non-jury defendants" and issued an outline of the procedures to be followed in the examination and cross-examination of the State's witnesses. According to the outline, after the State finished its direct examination, counsel for Petitioners (the jury defendants) were permitted to cross-examine in the jury's presence concerning their respective clients. Upon completion of cross-examination by Petitioners, the non-jury defendants were

permitted to cross-examine the State's witnesses in the jury's absence. The same procedures were to be followed with redirect and recross. However, unlike the jury, Justice Friedmann, who was also sitting as a trier of fact, had the benefit of all the direct and all the cross-examination of the State's witnesses.

As the trial progressed, counsel for both the jury and non-jury defendants recognized the inequities in the court's procedure. For example, counsel protested that Petitioners (the jury defendants) did not have the same benefits of cross-examination as did the non-jury defendants. Counsel for Petitioners argued that the jury was hearing direct testimony concerning the non-jury defendants, who were charged acting in concert with Petitioners, that was not tested during cross-examination. Yet the court, as the trier of fact for the non-jury defendants,

had the benefit of the entire direct and entire cross-examination. The court responded "I don't care. I will have to give constant instructions to the fact that they are to disregard anything unless it has to do with acting in con[cert]" (T616-17; emphasis added).

Petitioners' concerns that they were prejudiced by the court's procedure turned out to be well-founded. Not only did the jury miss cross-examination which brought out inconsistencies in the testimony of the complainant, the fire marshal who responded to the scene of the fire to conduct an investigation shortly after it was extinguished and then several days later, and the confidential informant (Joseph Minchella), who was cooperating with the Prosecutor's Office to avoid prosecution, but the court's promise that counsel for Petitioners could recross those witnesses became illusory when the promise was

conditioned upon redirect first being conducted by the Assistant Prosecutor.

With specific regard to Joseph Minchella, the Petitioners requested that the non-jury defendants cross-examine first, or that the jury hear the non-jury defendants' cross-examination of him. The requests were made because of Minchella's importance to the State's case. Not only were these applications denied, thereby requiring the Petitioners to cross-examine first, but their right to re-cross was short-circuited when the Assistant Prosecutor announced, "there is going to be no redirect, Your Honor" (T1688-89).

In California v. Green, 399 U.S. 149, 158 (1970), this Court explained that the Confrontation Clause of the Sixth Amendment,

> "(1) insures that the witness will give his statements under oath -- thus impressing him with the seriousness of the matter and guarding against the

> lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness making his statement, thus aiding the jury in assessing his credibility."

With few exceptions (see, e.g., Bruton v. United States, 391 U.S. 123 [1968]), the law has preferred joint trials rather than severance of defendants because joint trials promote judicial economy and efficiency in the administration of criminal justice (see Richardson v. Marsh, 481 U.S. 200, 210 [1987]; People v. Mahboubian, 74 N.Y.2d 174, 183, 544 N.Y.S.2d 769, 773, 543 N.E.2d 34 [Ct.Ap. 1989]). To this end, the law has generally recognized the propriety of multiple juries at the joint criminal trial of multiple defendants and the propriety of jury/non-jury trials in the context of a single

criminal trial (see United States v. LeBron-Gonzalez, 816 F.2d 823 [1st Cir. 1987]; Smith v. DeRobertis, 758 F.2d 1151, 1152 [7th Cir. 1985] [citing cases]; United States v. Lewis, 716 F.2d 16 (D.C.Cir. 1983], cert. denied, 464 U.S. 996 [1983]; United States v. Gonzalez, 610 F.Supp. 568 [D.Puerto Rico 1985]; People v. Ricardo B., 73 N.Y.2d 228, 538 N.Y.S.2d 796, 535 N.E.2d 1336 [Ct.App. 1989]; People v. Wallace, 153 A.D.2d 59, 549 N.Y.S.2d 515 (A.D. 2d Dept. 1989], app. denied, 75 N.Y.2d 925, 555 N.Y.S.2d 44, 554 N.E.2d 81 [Ct.App. 1990]). Viewed as a "partial form of severance" (People v. Ricardo B., supra, 73 N.Y.2d at p. 233, 538 N.Y.S.2d at p. 798), multiple juries are most frequently utilized in cases where Bruton-type problems would otherwise require severance (see United States v. Gonzalez, supra 610 F.Supp. 568).

Unquestionably, multiple juries, including the use of a jury/non-jury

procedure, is an innovative answer to the problems of court congestion and scarcity of judicial resources. In Smith v. DiRobertis, supra, 758 F.2d at p. 1152, the Seventh Circuit said,

> "[a]lthough the double-jury is an innovation with nothing more to recommend it than a saving in trial time, judicial economy is not a trivial goal in this era of massive caseloads; and the Supreme Court *** has shown that it is receptive to innovations designed to reduce the high costs of jury trials. ***
>
> Of course, if the particular innovation increased the risk of convicting the innocent, this would be a high price to pay for some modest savings in the costs of trials."

The growing concern over the ability of the judiciary to cope with burgeoning criminal dockets will inevitably lead to the more frequent use of multiple juries or jury/non-jury trials. However, as noted by the Second Circuit in an analogous context, "there are limits to the risks" a defendant must endure "in order to secure the public

benefits of savings in costs, time and judicial resources and of reduced burdens on disinterested witnesses" (United States v. Figueroa, 618 F.2d 934, 944 [2d Cir. 1980]).

In the case at bar, Petitioners were denied the same benefits of cross-examination accorded to their non-jury co-defendants, in that information was brought to the attention of Justice Friedmann in his capacity as the non-jury trier of facts which was not brought to the jury's attention, notwithstanding that the non-jury co-defendants were charged acting in concert with Petitioners. Moreover, the jury, unlike Justice Friedmann, had an abbreviated opportunity to observe the demeanor of the witnesses during their testimony (see Mattox v. United States, 156 U.S. 237, 242-43 [1895]; California v. Green, supra, 399 U.S. at p. 158).

Certiorari should be granted to review the procedures employed in this case and to set guidelines for future jury/non-jury and multiple jury trials to ensure against the dilution of the accused's fundamental rights to a fair trial and to his rights of confrontation and cross-examination.

B. Petitioner Phillip Amato's Right To Counsel of Choice.

In Wheat v. United States, 486 U.S. 153, 159 (1988), this Court recognized that the right to select and be represented by one's preferred attorney is a component of the Sixth Amendment right to counsel. However, that right is subject to limitations (Id.; United States v. Monsanto, 491 U.S. 600 [1989]; Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 [1989]).

One such limitation in New York is the so-called "advocate-witness" rule embodied in Disciplinary Rules 5-101(B) and 5-102 of

the Code of Professional Responsibility. As interpreted by the New York Court of Appeals, the rule "generally requires the lawyer to withdraw from employment when it appears that he or a member of his firm will be called to testify regarding a disputed issue of fact ***. Thus, once representation is undertaken, the lawyer must withdraw as advocate if it appears that he must testify on behalf of his own client *** or if it appears that he will be called as a witness to testify for the adverse party, where his testimony may be prejudicial to the client he is representing" (People v. Paperno, 54 N.Y.2d 294, 299-300 445 N.Y.S.2d 119, 122, 429 N.E.2d 797 [Ct. App. 1981]).

In this regard, the Court of Appeals recognizing the fundamental nature of the right to counsel of choice said that,

> "[t]he Code of Professional Responsibility establishes ethical standards that guide

> attorneys in their professional conduct, and its importance is not to be dismissed or denigrated by indifference ***. When raised in litigation, however -- which in addition to matters of professional conduct directly involves the interests of clients and others -- the Code provisions cannot be applied as if they were controlling statutory or decisional law" (S & S Hotel v. 777 S.H. Corp., 69 N.Y.2d 437, 443, 515 N.Y.S.2d 735, 738, 508 N.E.2d 647 [Ct.App. 1987]; emphasis added).

In this case, the trial court disqualified Petitioner Phillip Amato's retained counsel, and his firm, from representing him at trial, essentially because counsel testified at a pre-trial hearing in support of Petitioner's motion to suppress statements. The court explained that

> "[trial counsel] could become a witness at trial even though the statements *** were suppressed, should Phillip Amato testify at the trial, as those statements could then be used to impeach Phillip Amato's testimony, and thus the voluntariness of the statements

pursuant to CPL §60.45 would be at issue."

The court's concern was entirely misplaced because, under New York law, the question of voluntariness did not include the concerns mentioned by the court (see People v. Bing, 76 N.Y.2d 331, 337, 346-48, 351, 358, 361, 559 N.Y.S.2d 474, 476-77, 482-484, 485-86, 490, 492, 558 N.E.2d 1011 [Ct.App. 1990]). Consequently, trial counsel simply could not have been a witness had Petitioner elected to testify.

As it turned out, Petitioner Phillip Amato not only did not testify on his own behalf but, when called as a witness by his wife, Petitioner Rita Amato, he exercised his privilege against self-incrimination and refused to testify on her behalf. Even before trial, the court was well-aware that Petitioner Phillip Amato was not going to testify because, in conjunction with her motion to sever, Petitioner Rita Amato

submitted a supporting affidavit in which she alleged that her husband "does not intend to testify on his own behalf at a joint trial [and] has further advised me that should I call him as a witness in my behalf, he will not voluntarily testify and waive any of his rights under the Fifth Amendment to the U.S. Constitution."

A second justification for disqualification came after trial -- a justification which was unknown to the court when trial counsel and his firm were disqualified and, indeed was not even identified by the court as a reason in its Memorandum Decision. The justification, found to be persuasive by the Appellate Division, was that Petitioner Phillip Amato's substitute counsel called as a witness former counsel's law partner. A review of that defense witness' testimony, however, reveals that it was confined to reciting historical facts which were

undisputed, viz: that his and trial counsel's firm had represented an organization, of which Petitioners were members, in its legal efforts to block New York City from opening a foster care facility in their neighborhood. Though the testimony was background to explain the context in which the arson was allgedly committed, the testimony bore no relevance to the question of Petitioners' guilt or innocence. In short, when trial counsel and his firm were disqualified from further representation, the court had no reason to believe that a member of trial counsel's firm would be called as a witness.

Since the Court's 1988 ruling in Wheat v. United States, supra, motions to disqualify defense counsel have been made, and granted, with greater frequency (see Frost, "Lawyers Disqualified in Gotti Prosecution. Conflicts, Advocate-Witness Rules Cited," New York Law Journal,

7/29/91, p. 1). Indeed, the "advocate-witness" rule was relied upon as a basis for disqualifying counsel in a notorious case on the government's motion (see, United States v. John Gotti, et al., ____ F.Supp. ____ [E.D.N.Y. 1991] [New York Law Journal, 8/5/91, p. 21]). Certiorari should be granted to review the circumstances under which the "advocate-witness" rule may be successfully invoked as a limitation on a criminal defendant's right to counsel of choice.

C. Petitioner's Right To Compulsory Process.

As part of their defense, Petitioners subpoenaed the Commander of the Police Precinct at which the complainant testified she filed complaints against several members of the Gladwin Avenue community. The purpose of her testimony was to establish that there was animosity against her and her family antedating the fire at

her house. That animosity, according to the prosecution, provided a motive for the arson.

To rebut her testimony on this issue, and to establish her bias against them, Petitioners sought the testimony of the precinct commander which they expected would be that the complainant did not file those complaints. The court declined to enforce the subpoena requiring the precinct commander's attendance, and instead instructed Petitioners that were to rely on cross-examination of the complainant using police documents, furnished pursuant to subpoena, showing that the complaints were not filed.

Recognizing the wide discretion afforded trial courts concerning the admission of evidence, this Court in Crane v. Kentucky, 476 U.S. 683, 690 (1986) said that

> "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment *** or in the Compulsory Process or Confrontation clauses of the Sixth Amendment *** the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"

In United States v. Abel, 469 U.S. 45, 52 (1984), this Court unequivocally recognized the importance of evidence of a witness' bias, noting that, "[t]he 'common law of evidence' allowed the showing of bias by extrinsic evidence, while requiring the cross-examiner to 'take the answer of the witness' with respect to less favored forms of impeachment."

In the case at bar, Petitioners were denied their federally guaranteed rights to present a complete defense and compulsory process, being relegated "to less favored forms of impeachment" (Id.), to establish the complainant's bias against them.

Certiorari should be granted to review whether Petitioners' federally guaranteed rights to fairness in presenting their defense were violated by the trial court's seemingly arbitrary refusal to enforce a subpoena against a potential significant defense witness.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
November 19, 1991

Respectfully submitted,

RICHARD E. MISCHEL, P.C.
Attorney for Petitioners
Phillip Amato, Rita Amato,
and James Raffa
225 Broadway, Suite 2199
New York, New York 10007
(212) 227-7040

RICHARD E. MISCHEL, ESQ.

- Of Counsel -

APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

DECISION & ORDER
Argued - December 17, 1990

_____AD2d_____

LAWRENCE J. BRACKEN, J.P.
SYBIL HART KOOPER
THOMAS R. SULLIVAN
CORNELIUS J. O'BRIEN, JJ.

1887E

The People, etc., respondent,
v Phillip Amato, appellant.
(Ind. No. 3047/87)

Richard E. Mischel, P.C., New York, N.Y., for appellant
John J. Santucci, District Attorney, Kew Gardens, N.Y. (John Castellano of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Friedmann, J.), rendered September 9, 1988, convicting him of arson in the third degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed, and the matter is remitted to the Supreme Court, Queens County, for further proceedings pursuant to CPL 460.50(5).

Contrary to the defendant's contention, we find that his guilt of arson in the third degree was established beyond a reasonable doubt. The evidence adduced at trial established that on the night of April 20, 1987, a fire broke out at 171-27 Gladwin Avenue, Queens, a private one-family residence which had recently been leased by its owner to the City of New York for the purpose of housing foster children. The defendants Phillip and Rita Amato and James Raffa owned homes on Gladwin Avenue, and were active in neighborhood associations formed to oppose the city's plans. To this end they succeeded in obtaining a temporary restraining order enjoining the city from occupying the house, but had also, on several occasions prior to the actual fire, threatened to burn the house down.

The evidence further showed that on the night of the fire, as the codefendant Rita Amato gathered with her codefendants and other neighbors on the lawn across from the subject premises, she helped to lure the city's security guard from the home, told an uninvolved neighbor to stay inside his home, and then telephoned a television news station to tell them the house might be burned down. The defendant Phillip Amato, after directing Michael Scotto and another neighbor to act as lookouts, joined with the codefendant James Raffa, who was concealing a bottle of clear liquid under his jacket, and the codefendant Ugo Serrone, and walked into the rear yard of the property adjoining the subject house. The sound of glass breaking was heard shortly thereafter, and the house was soon filled with smoke and flames. As the building was blazing, the defendants stood watching from across the street, some toasting the fire with glasses of liquor. An investigation revealed that the fire was intentionally set by use of a flammable liquid.

Viewing this circumstantial evidence in the light most favorable to the People (*see, People v Contes*, 60 NY2d 620), we conclude that the facts from which the jury could infer the defendant's guilt were inconsistent with his innocence and

excluded to a moral certainty every other reasonable hypothesis but guilt (*see, People v Betancourt*, 68 NY2d 707; *People v Giuliano*, 65 NY2d 766). Moreover, upon the exercise of our factual review power, we are satisfied that the verdict was not against the weight of the evidence (*see*, CPL 470,.15[5]).

The codefendants Michael Scotto and Ugo Serrone waived their right to a jury trial and the remaining defendants moved for severance. Contrary to the defendant's contention on appeal, we do not find that the court's denial of his motion for a severance was an improvident exercise of discretion, or that the joint trial violated his rights under the Confrontation Clause. The evidence against all five defendants, who were charged with acting in concert, was essentially identical, and the defendant failed to proffer the requisite "cogent reasons" (*People v Bornholdt*, 33 NY2d 75, 87, *cert denied sub nom. Victory v New York*, 416 US 905) to warrant separate trials (*see, People v Mahboubian*, 74 NY2d 174, 183). Moreover, we find that under the circumstances of this case, the trial court exercised its discretion within permissible legal limits when it ordered a joint bench and jury trial, and that the procedure did not prejudice the defense (*see, People v Wallace*, 153 AD2d 59; *see also, People v Ricardo B.*, 73 NY2d 228).

The defendant also contends that the court violated his constitutional right to counsel of his own choice when it disqualified the law firm he had originally retained, after a member of that firm testified at a pretrial hearing. We disagree.

The right to counsel of one's own choosing is not absolute but may be overridden where necessary (*see, S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437; *People v Arroyave*, 49 NY2d 264). One restriction on the right is the so-called "advocate-witness rules". This rule is embodied in the provision of Code of Professional Responsibility, DR 5-101(B) and 5-102, and generally requires counsel to withdraw

from employment when it appears that he or a member of his firm will be called as a witness to testify regarding a disputed issue of fact (*see, e.g., United States v DeFazio*, 899 F2d 626; *United States v Cunningham*, 672 F2d 1064, *cert denied* 466 US 951).

In this case, the defendant claims that a member of the law firm which he retained to defend him at trial had contacted investigators and had advised them of his representation of the defendant, and that these investigators nevertheless continued to question the defendant. The attorney in question testified at the pretrial hearing on this issue. Although the court granted the defendant's motion to suppress to the extent that it was premised on this argument, the People indicated an intent to use the illegally obtained statement in order to impeach the defendant should he testify at trial.

Under these circumstances, the trial court was understandably concerned with the prospect that the propriety of the defendant's incriminating statements might still surface as an issue at trial, leading to the possibility that the defendant's trial counsel would have to testify. The propriety of the trial court's ruling was later borne out when a member of the law firm in question in fact testified at the trial. Under these circumstances, we conclude that the trial court did not err or improvidently exercise its discretion in disqualifying the defendant's attorney.

We have examined the defendant's remaining contentions and find them to be without merit.

BRACKEN, J.P., KOOPER, SULLIVAN and O'BRIEN, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

DECISION & ORDER
Argued - December 17, 1990

_____AD2d_____

LAWRENCE J. BRACKEN, J.P.
SYBIL HART KOOPER
THOMAS R. SULLIVAN
CORNELIUS J. O'BRIEN, JJ.

1888E

The People, etc., respondent,
v Rita Amato, appellant.
(Ind. No. 3047/87)

Schapiro and Reich, Lindenhurst, N.Y. (Perry S. Reich of counsel), for appellant.

John J. Santucci, District Attorney, Kew Gardens, N.Y. (John Castellano of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Friedmann, J.), rendered September 9, 1988, convicting her of arson in the third degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed, and the matter is remitted to the Supreme Court, Queens County, for further proceedings pursuant to CPL 460.50(5).

We have considered and rejected most of the contentions raised by the defendant upon the appeal by her codefendant Phillip Amato, with whom this defendant was jointly tried (*see, People v Amato,* ____AD2d____[decided herewith]). The defendant has not raised any arguments requiring a different result.

BRACKEN, J.P., KOOPER, SULLIVAN and O'BRIEN, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

DECISION & ORDER
Argued - December 17, 1990

_____AD2d_____

LAWRENCE J. BRACKEN, J.P.
SYBIL HART KOOPER
THOMAS R. SULLIVAN
CORNELIUS J. O'BRIEN, JJ.

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The People, etc., respondent,
v James Raffa, appellant.
(Ind. No. 3047/87)

Eugene B. Nathanson, Brooklyn, N.Y., for appellant.

John J. Santucci, District Attorney, Kew Gardens, N.Y. (John Castellano of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Friedmann, J.), rendered September 9, 1988, convicting him of arson in the third degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed, and the matter is remitted to the Supreme Court, Queens County, for further proceedings pursuant to CPL 460.50(5).

We have considered and rejected most of the contentions raised by the defendant upon the appeal by his codefendant Phillip Amato, with whom this defendant was jointly tried (*see, People v Amato*, ____AD2d____[decided herewith]). The defendant has not raised any arguments requiring a different result.

In addition, we note that we agree with the defendant that the court erred in precluding him from questioning Fire Marshal John Carney regarding a prior inconsistent statement made to him by Joseph Minchella, which, at trial, Minchella denied making (*see*, Richardson, Evidence, §§ 501, 502 [Prince 10th ed]). However, in light of the overwhelming evidence of the defendant's guilt adduced at the trial, the error was harmless (*see, People v Crimmins*, 36 NY2d 230).

BRACKEN, J.P., KOOPER, SULLIVAN and O'BRIEN, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

STATE OF NEW YORK
COURT OF APPEALS

CERTIFICATE DENYING LEAVE UPON RECONSIDERATION

BEFORE: HON. VITO J. TITONE Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

PHILLIP AMATO,

Appellant.

I, VITO J. TITONE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Staten Island, New York
August 21, 1991

Associate Judge

Order of Appellate Division, Second Department dated May 28, 1991, affirming a judgment of Supreme Court, Queens County rendered September 9, 1988.

*Description of Order

STATE OF NEW YORK
COURT OF APPEALS

CERTIFICATE DENYING LEAVE UPON RECONSIDERATION

BEFORE: HON. VITO J. TITONE Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

RITA AMATO,

Appellant.

I, VITO J. TITONE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Staten Island, New York
August 21, 1991

Associate Judge

Order of Appellate Division, Second Department dated May 28, 1991, affirming a judgment of Supreme Court, Queens County rendered September 9, 1988.

*Description of Order

STATE OF NEW YORK
COURT OF APPEALS

CERTIFICATE DENYING LEAVE UPON RECONSIDERATION

BEFORE: HON. VITO J. TITONE Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

JAMES RAFFA,

Appellant.

I, VITO J. TITONE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Staten Island, New York
August 21, 1991

Associate Judge

Order of Appellate Division, Second Department dated May 28, 1991, affirming a judgment of Supreme Court, Queens County rendered September 9, 1988.

*Description of Order

(2)

No. 91-814

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PHILLIP AMATO, RITA AMATO, and JAMES RAFFA,

Petitioners,

vs.

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, SECOND DEPARTMENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RICHARD A. BROWN
District Attorney
Queens County
Attorney for Respondent
125-01 Queens Boulevard
Kew Gardens, New York 11415
(718) 520-5831

BARBARA D. UNDERWOOD
MICHAEL O'BRIEN
JOHN CASTELLANO
Assistant District Attorneys
Of Counsel

QUESTIONS PRESENTED

1. Whether the petitioners' confrontation rights were violated when, in a jury trial conducted jointly with a non-jury trial of other defendants, petitioner was permitted to cross-examine all witnesses as to every aspect of their testimony, but the cross-examination by the non-jury co-defendants was conducted out of the presence of the jury.

2. Whether the right to counsel of choice precludes a trial court from disqualifying an attorney for a violation of the ethical rule against an advocate becoming a witness.

3. Whether the right to compulsory process requires the production of a witness whose testimony would be cumulative.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

PHILLIP AMATO, RITA AMATO, and
JAMES RAFFA,

Petitioners,

-against-

STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

Petitioners Phillip Amato, Rita Amato, and James Raffa seek a writ of certiorari to review the orders of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered on May 28, 1991 which unanimously affirmed the

judgments of the Supreme Court of the State of New York, Queens County, entered on September 9, 1988, convicting petitioners of arson in the third degree (N.Y. Penal Law §150.10) and imposing sentence. *People v. Phillip Amato,* __A.D.2d__, 570 N.Y.S.2d 817; *People v. Rita Amato,* __A.D.2d__, 570 N.Y.S.2d 1017; *People v. James Raffa,* __A.D.2d__, 570 N.Y.S.2d 819. Leave to appeal to the New York Court of Appeals was denied on June 25, 1991, __N.Y.2d__, and reconsideration of the application was denied on August 21, 1991. __N.Y.2d__. The Petition for a Writ of Certiorari was filed within the time prescribed by Supreme Court Rules 13 and 28.

STATEMENT OF THE CASE

Introduction

On April 20, 1987, at approximately 11:00 p.m. a fire broke out at 171-27 Gladwin Avenue in Queens, a single-family house leased by the City of New York a few days before for the purpose of housing foster babies. In the weeks immediately preceding the fire, petitioners, who owned neighboring homes on Gladwin Avenue, repeatedly threatened the owners of the premises that petitioners would burn the house down rather than allow New York City to carry out its plans. On the evening of the fire, petitioners lured a security guard hired by the City away from the premises with an explosion and a verbal warning. Minutes before the fire broke out, petitioners Phillip Amato and James Raffa secured two others (Michael Scotto and

Joseph Minchella) to act as lookouts while Amato, Raffa and Ugo Serrone went behind the property adjourning the leased premises with a third accomplice, Ugo Serrone. Petitioner Raffa carried a clear liquid in an unmarked bottle concealed beneath his coat. Glass was heard breaking behind the leased residence one minute later and the house was soon filled with smoke and flames. Petitioners were indicted by a Queens County Grand Jury on charges of arson in the third degree (N.Y. Penal Law §150.10) and burglary in the first and third degrees (N.Y. Penal Law §§140.30, 140.20). Petitioner Phillip Amato and Michael Scotto were charged in the same accusatory instrument with committing the crime of criminal solicitation in the fourth degree (N.Y. Penal Law §100.05).[1]

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1 Minchella testified for the petitioner and was not charged with any crime.

The Pre-trial Hearing to Suppress Statements and the Motion for Disqualification

Petitioner Phillip Amato moved to suppress statements made by him on the ground that they were obtained in violation of his state constitutional right to counsel. In requesting a hearing on the issue, he argued specifically that his retained attorney had contacted law enforcement authorities prior to the time the statements were taken and had ordered the cessation of any questioning. If true, this face alone would require suppression under New York law. *People v. Skinner*, 52 N.Y.2d 24, 436 N.Y.S.2d 207 (1980).

Prior to the commencement of the hearing, the prosecution moved to disqualify Phillip Amato's attorney, the same attorney who had allegedly contacted law enforcement authorities, on the

ground that he was an indispensable witness on behalf of his client and that he was therefore precluded from continuing the representation under New York's Code of Professional Responsibility. DR5-101, 5-102. The court held its determination of the motion in abeyance while the hearing was commenced.

During the course of the proceedings which followed counsel continued to represent defendant Amato, conducting direct and cross-examination of several witnesses. Counsel also took the stand on his client's behalf. As predicted, counsel testified that on April 27, 1987, prior to the time the statements were made, he telephoned the Fire Marshall Command Post where members were investigating the arson. He allegedly informed the "dispatcher" that

he represented petitioners Phillip Amato and Rita Amato and that he "did not want them questioned or visited by any law enforcement officials." The prosecution vigorously contested this testimony at the hearing, not only by attempting to impeach counsel on cross-examination but also by introducing the testimony of the fire marshall who received counsel's call. Counsel had not, according to this prosecution witness, stated the purpose of his call, that he represented anyone, or that the petitioners should not "be visited or questioned," but had simply asked that the fire marshall assigned to the case return his call. In their respective memoranda of law on the hearing issues, petitioner's counsel and the prosecutor argued counsel's credibility at length on this pivotal issue. The hearing court credited

counsel's testimony, held that there existed a violation of the state right to counsel and suppressed the statements.[2] The court also issued a separate written decision recognizing counsel's ethical violation of the advocate-witness rule, as the prosecutor had argued, and disqualified counsel.

The defendant thereafter moved for reargument of the disqualification motion. Ignoring the prior ethical violation, counsel sought to assure the court that neither counsel nor a member of his firm would be called again at trial. Counsel argued, among other things, that because the defendant's statement had been suppressed, there would no longer be any need for the testimony of counsel or a member of his

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2 The court did not rule on the voluntariness of the statements generally.

firm in violation of the rule. The court adhered to its original decision, noting, inter alia, that if petitioner Phillip Amato were to take the stand at trial, the suppressed statements could still be introduced for impeachment purposes. *Harris v. New York,* 401 U.S. 222 (1971); *People v. Meadows,* 64 N.Y.2d 956, 958, 488 N.Y.S.2d 643 (1985). The voluntariness of the statements under the state constitution would then once again be an issue before the jury, necessitating counsel's testimony. N.Y. Crim. Proc. Law §§710.70, 60.45(2)(b)(ii); *People v. Graham,* 51 N.Y.2d 214, 447 N.Y.S.2d 918 (1982).

The Trial

Petitioners were jointly tried with their co-defendants Scotto and Serrone. While petitioners elected to proceed before a jury, Scotto and Serrone waived

their jury trial rights. Under the procedure adopted by the court, the jury did not hear the cross-examination conducted by counsel for the non-jury defendants. However, the jury did hear cross-examination as to the evidence concerning those defendants, to the extent petitioners chose to conduct such cross-examination.

The evidence adduced at trial established the following: In April of 1987, the City of New York leased the private one-family residence at 171-27 Gladwin Avenue in Flushing, Queens for the purpose of housing foster children. After these plans became public, petitioners Rita and Phillip Amato, who owned homes on the same block as the leased premises, threatened the owner of the house on several occasions that they would burn the residence down rather than

see it converted to the planned social service use. Petitioner Raffa, who lived three houses away from the planned foster residence, also threatened the owner over the phone and was overheard telling Phillip Amato in reference to the leased premises: "If you smell smoke, wait five minutes before you do anything."

On April 20, 1987, petitioner Rita Amato forced the city's security guard from the home using a firework explosion and a warning to the guard that she "could not be responsible for what happened" if the guard remained on the premises. She also telephoned a television news station and suggested that the house might be burned down. Later that evening, petitioner Phillip Amato directed co-defendant Michael Scotto and Joseph Minchella, a witness for the prosecution, to act as lookouts

and entered the driveway of the house adjoining the leased premises with petitioner Raffa and co-defendant Serrone. Raffa was nervously concealing an unmarked bottle of clear liquid under his jacket. Within one minute, glass was heard breaking behind the leased residence and flames and smoke began pouring out of the house soon afterward. As the house burned, petitioners stood by, some toasting the fire with glasses of liquor. Fire marshalls subsequently determined that the fire was intentionally set by use of a flammable liquid.

Despite counsel's pretrial assurances that there would no longer be any need for the testimony of prior counsel or a member of his firm, petitioner Phillip Amato did, in fact, call prior counsel's law partner, Joseph

Giaimo, to the stand. Giaimo, who represented petitioner Rita Amato in a civil suit to enjoin the City from carrying out its planned use, testified concerning the temporary restraining order which allegedly precluded the city from taking possession of the house or sending a security guard to occupy it. The alleged violation of the TRO was designed to provide an innocent explanation for many aspects of the otherwise unexplained conduct of the defendants on the night of the fire, including the repeated efforts to get the security guard out of the house and the solicitation of Minchella to "watch guard," allegedly for a violation of the TRO. The testimony regarding the order also demonstrated the defendants' pursuit of their goal by lawful means which supposedly raised a doubt as to why they

would abandon these efforts in favor of illegal means. The prosecution contested the validity and effect of the TRO, contending that the order was stayed prior to the date of the fire, thereby eliminating the supposed justification for the defendant's actions on the night the house was burned. Giaimo, in turn, attempted to contradict the prosecutor's contention by testifying that he personally checked the court records and found no evidence that the order was stayed.

The Verdict and Sentence

Petitioners were convicted of arson in the third degree.[3] Michael Scotto and Ugo Serrone were convicted of criminal solicitation in the fourth degree.

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3 The solicitation charge against Phillip Amato was dismissed after opening statements. The jury convicted petitioners of burglary, but those charges were dismissed by the court.

Petitioner Phillip Amato was sentenced to an indeterminate term of imprisonment of from two to six years, petitioner James Raffa was sentenced to one and one-half to four and one-half years incarceration, and petitioner Rita Amato was sentenced to one to three years incarceration.

The Appeals

The Appellate Division, Second Judicial Department, affirmed the judgments of conviction in three separate opinions dated May 28, 1991. *People v. Phillip Amato,* __A.D.2d__, 570 N.Y.S.2d 817; *People v. Rita Amato,* __A.D.2d__, 570 N.Y.S.2d 1017; *People v. James Raffa,* __A.D.2d__, 570 N.Y.S.2d 819. The court held that the use of a joint jury and non-jury trial was proper and that the procedure used by the court did not prejudice the defense. __A.D.2d__, 570

N.Y.S.2d at 818. The court also held that petitioner Phillip Amato's right to counsel of choice was not violated by the trial court's disqualification of his attorney. The court observed that the right to counsel of choice is not absolute and that one restriction on the right is the "advocate-witness rule," embodied in Code of Professional Responsibility Disciplinary Rules DR5-101 and 5-102. The Appellate Division noted that counsel had testified at the pre-trial hearing and found that the trial court was "understandably concerned with the prospect that the propriety of the defendant's incriminating statements might still surface as an issue at trial, leading to the possibility that the defendant's trial counsel would have to testify." __A.D.2d at___, 570 N.Y.S.2d at 819. The court also found that the

"propriety of the trial court's ruling was later borne out when a member of the law firm in question in fact testified at trial." *Id.*

The Appellate Division rejected petitioner's remaining contentions as meritless without further comment.[4] Leave to appeal to the New York Court of Appeals was denied on June 25, 1991, __N.Y.2d__, and reconsideration of the application was denied on August 21, 1991. __N.Y.2d__.

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4 The court also found the evidence of guilt was sufficient to support the arson convictions of each defendant and addressed one further issued raised by petitioner James Raffa concerning the admissions of a prior inconsistent statement of a prosecution witness. These contentions are not raised in the Petition before this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

The issues raised by petitioners concerning the procedure adopted by the court at their joint jury and non-jury trial, the disqualification of counsel for his violation of the advocate-witness rule, and the production of a witness offering cumulative testimony, do not warrant this Court's review. As the Petition for a Writ of Certiorari in this matter makes clear, none of these matters involve any conflict among state and federal court decisions. *See Sup. Ct. R.* 10.1(a) and (b). Furthermore, the Appellate Division decision in the instant matter did not decide any federal issue in a manner that conflicts with the prior decisions of this Court and none of the issues presented require modification or clarification of this Court's prior decisions. *See Sup. Ct. Rule* 10.1(c).

A. The Joint Jury and Non-Jury Trial

This case does not raise any large issues concerning the propriety or procedure for holding joint trials before different fact finders. Petitioners do not challenge the trial court's decision to conduct a joint jury and non-jury trial. Nor could they, in view of the uniform approval of such procedures by every state and federal court that has considered the matter.[5] Instead, they

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5 All of the federal circuit courts and state courts of last resort which have considered the issue agree that joint trials before different fact finders are permissible in the absence of a showing of prejudice. *See, e.g., United States v. Lebron-Gonzalez,* 816 F.2d 823, 831 (1st Cir. 1987); *United States v. Lewis,* 716 F.2d 16, 19 (D.C. Cir. 1983); *United States v. Hayes,* 676 F.2d 1359, 1366 (11th Cir.), *cert. denied,* 459 U.S. 1040 (1982); *United States v. Rimar,* 558 F.2d 1271, 1273 (6th Cir. 1977), *cert. denied,* 434 U.S. 984 (1978); *United States v. Sidman,* 470 F.2d 1158, 1167-1170 (9th Cir. 1972), *cert. denied,* 409 U.S. 1127 (1973); *People v. Ricardo B.,* 73 N.Y.2d 228, 538 N.Y.S.2d 796 (1989); *People v. Harris,* 47 Cal 3d 1047, 767 P.2d 619 (1989); *State v. Beam,* 109 Idaho 616, 710 P.2d 526 (1985), *cert. denied,* 476 U.S. 1153 (1986); *People v. Ruiz,*

challenge only the trial court's ruling that prohibited the jury from hearing the cross-examination conducted by counsel for the non-jury defendants. According to petitioners, this procedure violated the petitioners' Confrontation Clause rights.

Review of this claim is unwarranted. Petitioners were given the full and fair opportunity to cross-examine the People's witness required by the Confrontation Clause. *Delaware v. Fensterer,* 474 U.S. 15, 21-22 (1985). The critical inquiry is whether the ruling of the court interfered with the defendant's opportunity for effective

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94 Ill.2d 245, 447 NE2d 148 (1982), *cert. denied,* 462 U.S. 1112 (1983); *State v. Corsi,* 86 NJ 172, 430 A.2d 210 (1981). (footnote continued) Petitioners acknowledge that joint trials before different fact finders are an appropriate answer to the problems of court congestion and the scarcity of judicial resources. Petition for Writ of Certiorari, pp. 18-19.

cross-examination. *Kentucky v. Stincer*, 482 U.S. 730, 740 (1989).

The trial record establishes that the court did not limit or interfere in any way with cross-examination by counsel for petitioners. In particular, they were never precluded by the court from asking any question before the jury pertaining to the acts of, or evidence relating to, the non-jury co-defendants. They have not identified any cross-examination conducted by the co-defendants out of the presence of the jury which they could not also have conducted in front of the jury.

In fact, with regard to the challenged testimony of the owner of the burned premises, the court varied its pre-arranged procedure at the request of petitioners' counsel and allowed the non-jury defendants to examine the witness

first. All of the petitioners thus had the benefit of hearing the non-jury cross-examination before their own and had the opportunity to repeat any portion of that cross on their own cross-examination if they believed it significant.

Similarly, notwithstanding petitioners' conclusory assertions with regard to Joseph Minchella's testimony, counsel for petitioners had every opportunity to introduce the alleged prior inconsistent testimony of Minchella regarding the non-jury co-defendants. Counsel never alleged that they were unaware of the prior inconsistent testimony of the witness nor did they ever offer any other reason why the prior inconsistent statements could not have been brought out before the jury as part of petitioners' cross-examination.

Because petitioners' opportunity to cross-examine the witnesses was never restricted, both the trial court and the Appellate Division properly rejected petitioners Confrontation Clause claims. *Van Arsdale,* 475 U.S. at 679; *Fernesterer,* 474 U.S. at 679.

Moreover, although petitioners have repeatedly asserted that the cross-examination of Minchella by counsel for the non-jury defendants contained instances of impeachment with prior sworn testimony regarding the acts of Serrone and Scotto, a review of that cross-examination reveals that no such impeachment actually took place. Thus, even if the jury had heard the non-jury defendants cross-examination, they would not have heard any prior sworn

contradictory statements.[6]

If petitioners had been granted the severance they requested, they would have been in no better position than they were at the joint trial. At separate trials, the evidence regarding Scotto and Serrone, with whom petitioners were alleged to have been acting in concert, would still have been admissible, *Anderson v. United States,* 417 U.S. 211, 219 (1974); *People v. Plummer,* 36 N.Y.2d 161, 163-164, 365 N.Y.S.2d 842, 845

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6 Petitioners allege in a conclusory fashion that as a result of the procedure adopted by the court, the jury was unable to hear "inconsistencies" in the testimony of one of the fire marshalls. Petition for a Writ of Certiorari, p. 15. The only such inconsistency was one fire marshall's "guess" as to what time a second fire marshall left the burned premises on the morning after the fire. As to this, the trial court immediately offered a remedy to petitioners, inviting them to recall the second fire marshall to the stand so that he could be confronted with the alleged discrepancy. Petitioners declined the offer, however, and they are thus not now in a position to maintain that they were prevented from presenting the inconsistency to the jury.

(1975); *People v. Kornegay,* __A.D.2d__, 559 N.Y.S.2d 552, 553 (2d Dept. 1990), and the jury would still not have heard any cross-examination by the non-jury co-defendants. Petitioners have never offered any reason why they should have been placed in a better position at the joint trial than they would have been in the event of separate trials. Thus, petitioners' claim is fundamentally flawed for this reason also. *See United States v. Cunningham,* 723 F.2d 217, 230 (2d Cir. 1983), *cert. denied,* 466 U.S. 951 (1984).

Since petitioner's claim raises no conflict among lower court decisions, and since the law concerning the Confrontation Clause as enunciated by this Court does not require modification or amplication in order to resolve this issue, the Appellate Division's decision

does not warrant review by this Court.

B. The Disqualification of Petitioner Phillip Amato's Attorney

The disqualification of petitioner Phillip Amato's attorney was a straightforward application of the universal rule against an advocate becoming a witness and does not warrant this Court's review. The violation of the rule by petitioner's counsel was not hypothetical or speculative -- petitioner's attorney actually testified at the pre-trial hearing on a pivotal, disputed issue of fact. Moreover, the court had ample reason to mistrust counsel's assurances that no further testimony would be required.

In *Wheat v. United States,* 486 U.S 153 (1988), this Court observed that while the right to counsel of choice is comprehended by the Sixth Amendment, "the

essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Id.* at 159. This Court went on to state that the right to counsel of choice is circumscribed in many important respects, most notably by the courts "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Id.* at 697.

As the federal and state courts considering the issue have uniformly recognized, and as petitioners acknowledge (Petition for a Writ of Certiorari, pp. 21-22), one of the limitations on the right to counsel of choice is the "advocate-witness" rule.

See, e.g., United States v. DeFazio, 899 F.2d 626, 629-632 (1st Cir. 1990); *United States v. Kwang Fu Peng,* 766 F.2d 82 (2d Cir. 1985); *United States v. McKeon,* 738 F.2d 26, 34-35 (2d Cir. 1984); *State v. Rapuano,* 192 Conn. 228, 471 A 240, 242-243 (1984); *People v. Rivera,* __A.D.2d__, 568 N.Y.S.2d 435 (2d Dept. 1991); *see also Manhalt v. Reed,* 847 F.2d 576, 581 (9th Cir. 1988); *United States v. Nichols,* 841 F.2d 1485, 1503 (10th Cir. 1988); *Ex Parte Brown,* 551 So.2d 1009, 1010-1011 (Ala. 1989); *State v. Leonard,* 707 P.2d 650, 652-654 (Utah 1985).

While the rule is currently embodied in Disciplinary Rules 5-101 and 5-102 of the Code of Professional Responsibility, promulgated by the American Bar Association in 1969 and adopted in New York in 1970, the rule predates the Code by at least half a

century. *See* American Bar Association Canons of Ethics, Canon 19 (adopted 1908). Indeed, the origins of the rule can be traced back to the middle of the 19th century. 3 J. Wigmore, *Evidence* §1911 (3d ed.).

As interpreted by the New York Courts, the rule requires an attorney to withdraw from employment, or be disqualified, when he learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client. *People v. Limongelli,* 156 A.D.2d 472, 548 N.Y.S.2d 759, 761 (2d Dept. 1989); *Solomon v. N.Y. Property Insurance Underwriting Association,* 118 A.D.2d 695, 500 N.Y.S.2d 41 (2d Dept. 1986); *North Shore Neurosurgical v. Levy,* 26 A.D.2d 598, 421 N.Y.S.2d 100 (2d Dept. 1979).

Further, as state and federal

courts agree, the decision whether counsel should be allowed to act both as an attorney and as a witness is a matter addressed to the sound discretion of the trial court. *See, e.g., United States v. DeFazio,* 899 F.2d at 629; *United States v. Morris,* 714 F.2d 669 (7th Cir. 1983) (citing cases); *United States v. Kwang Fu Peng,* 766 F.2d at 87; *Solomon v. N.Y. Property,* 118 A.D.2d at 695, 500 N.Y.S.2d at 42; *Death v. Salem,* 111 A.D.2d 778, 780, 490 N.Y.S.2d 526 (2d Dept. 1985).

Here, counsel's violation of the rule was beyond dispute. He represented Phillip Amato while appearing as a witness on his client's behalf at the hearing. His testimony, far from concerning a "matter of formality" or an "uncontested matter," was the pivotal issue in the case, contested vigorously by the prosecution on both cross-

examination and on the rebuttal case. Counsel's credibility accounted for much of the argument between the defense and the prosecution in their respective memoranda of law and was critical to the trial court's decision on the suppression motion. Under these circumstances, the court's decision to grant the prosecutor's motion to disqualify counsel was well within its discretion. Indeed, disqualification should have been granted even prior to the hearing when the prosecutor initially raised the issue. The fact that petitioner received the benefit of counsel's representation for the duration of the hearing, several weeks longer than it should have continued, does not lend support to his current argument.

Furthermore, as the trial court

correctly noted, the possibility that counsel would testify on the issue of the voluntariness of petitioner's statements if they were introduced for impeachment purposes at trial raised the prospect of yet another violation of the rule. Contrary to petitioner's assertion, under New York law the jury must determine the voluntariness of a statement including the question whether it was obtained in violation of a defendant's state or federal constitutional rights. N.Y. Crim. Proc. Law §710.70, 60.45(2)(b)(ii); *People v. Graham,* 51 N.Y.2d 214, 447 N.Y.S.2d 918 (1980).

The issue as to which counsel testified in the instant matter, his efforts to contact the Fire Marshall Command Post, went directly to the validity of petitioner's statement under

the state constitution. *See People v. Skinner,* 52 N.Y.2d 24, 436 N.Y.S.2d 207 (1981). Thus, as the Appellate Division held, the state trial court correctly perceived a substantial likelihood that counsel would be compelled to testify if the petitioner's statements were admitted at trial.

Petitioner's citation to *People v. Bing,* 76 N.Y.2d 331, 559 N.Y.S.2d 474 (1990) in this regard is misplaced. That case, while eliminating the derivative right to counsel arising from a suspect's representation on unrelated charges, did not alter the New York Court of Appeals prior rulings concerning counsel who seeks to intervene in the case under investigation. 76 N.Y.2d at 350, 559 N.Y.S.2d at 485.

Furthermore, the fact that

petitioner Rita Amato filed an affidavit in an unrelated motion alleging that her husband would not take the stand at trial did not require a different result on the disqualification motion. Even assuming that the court was obligated to consider this unrelated affidavit on this issue, petitioner Rita Amato's statement in no way bound her husband nor did petitioner Phillip Amato ever provide confirmation of his wife's statement. Petitioner Phillip Amato was free to take the stand in his own defense at trial, and the prosecutor was free to use the tape-recorded statements for impeachment purposes in that event. Accordingly, the concern that another violation of the advocate-witness rule would occur was not eliminated by Mrs. Amato's affidavit.

Finally, petitioners' assurances

that the testimony of counsel or other firm members would not be required at trial were belied when petitioner called counsel's law partner at trial. As specified in the provisions of DR 5-102, where an attorney is disqualified due to the advocate-witness rule, other members of the firm are likewise disqualified from the representation. *See Cardinale v. Golinello,* 43 N.Y.2d 288, 295, 401 N.Y.S.2d 191 (1977); *see also* DR 1-102(a)(2). The partner's testimony here was crucial to the defense, providing an explanation for much of the petitioners' conduct that occurred on the night of the fire and demonstrating the petitioners' pursuit of lawful means to achieve their goals. Further, the prosecutor disputed the validity, effect and significance of the order. Thus, had counsel continued his representation

of petitioner, a second violation of the advocate-witness rule would, in fact, have occurred.

In short, the decisions of the courts' below on the disqualification issue were entirely consistent with this Court's decision in *Wheat* and with the federal and state courts decisions permitting the invocation of the "advocate-witness" rule in a criminal case.

C. Petitioners' Request to Call the Precinct Commander

The trial court's decision not to compel the testimony of the Commander of the 109th Police Precinct in Queens was a reasonable exercise of discretion and does not raise a constitutional question worthy of this Court's review. The Commander would have testified that there were no complaints on file at the

Precinct pertaining to threats made by the petitioners against the owner of the burned residence. Prior to this request, the trial court had enforced a subpoena duces tecum for all complaints filed by the owner of the premises during the relevant period, and the owner had admitted on the stand that no complaints concerning the threats were among the documents produced. Because the trial court did nothing more than exercise the discretion afforded to it under this Court's decisions to preclude repetitive or cumulative testimony, and because no conflict exists over the applicable law, review by this Court is unwarranted.[7]

As this Court held in *Taylor v. Illinois*, 484 U.S 400 (1988), the

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7 The Appellate Division did not comment on this claim in affirming the judgments of conviction.

compulsory process clause does not grant defendant an "unfettered right to offer testimony that is . . . inadmissible under standard rules of evidence." *Id.* at 410. On the contrary, even where the evidence offered goes to the bias of a prosecution witness, trial judges retain "wide latitude to impose reasonable limits on the introduction of evidence by a defendant based on concerns about, among other things, confusion of the issues or . . . interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdale,* 475 U.S. 673, 679 (1986). Indeed, state and federal courts uniformly agree that cumulative testimony offered by a defendant may be precluded. *See, e.g., Hamling v. United States,* 418 U.S. 87, 127; *Goldsby v. United States,* 160 U.S. 70, 73 (1895); *United States v. Webster,* 750 F.2d 307

(5th Cir. 1984), *cert. denied,* 471 U.S. 1106 (1985); *Rose v. Estelle,* 694 F.2d 1008, 1010-1011 (5th Cir. 1983); *Wright v. State,* 270 Ark. 78, 603 S.W.2d 408 (1980); *People v. Clarke,* 155 A.D.2d 283, 547 N.Y.S.2d 46 (1st Dept. 1989); *see also State v. Johnson,* 231 Kan. 151, 643 P.2d 146 (1982); 1 J. Wigmore *Evidence* §10a, p. 685 (Tillers Rev. 1983).

Here, the trial court merely exercised its discretion to preclude evidence which was otherwise before the jury. The owner acknowledged on the stand that there was no document supporting her claim among the materials subpoenaed from the 109th Precinct. In summation, counsel again pointed out to the jury, without dispute, that all complaints made by the owner were subpoenaed from the 109th Precinct and

that there was no complaint corroborating the owner's testimony as to the prior threats. Because the testimony of the Commander of the 109th Precinct would have added nothing to the evidence already before the jury, the trial court acted within its discretion in refusing to require the witness' attendance.

Since the applicable law is undisputed and since the court did no more than exercise its discretion to preclude cumulative testimony, review of this issue by this Court is unwarranted.

CONCLUSION

The issues presented by petitioners raise no conflict among state or federal court decisions nor do they raise any problem of substantial significance meriting this Court's review. The relevant legal principles are undisputed and the state courts applied those principles in a manner fully consistent with this Court's opinions. Accordingly, the writ of certiorari should be denied.

Respectfully submitted,

RICHARD A. BROWN
District Attorney
Queens County

BARBARA D. UNDERWOOD
MICHAEL O'BRIEN*
JOHN CASTELLANO
Assistant District Attorneys

Queens County District Attorney's Office
125-01 Queens Boulevard
Kew Gardens, New York 11415
(718) 520-5831

*Counsel of record

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